MUTHIAH RAMASAMY v. MUGUTHAN VADIVELOO

HIGH COURT MALAYA, KUALA LUMPUR
MOHD ARIEF EMRAN ARIFIN JC
[WRIT SUMMONS NO: WA-23NCVC-42-06-2020]
19 MAY 2022

Abstract – *For a litigant to be successful in a claim against a professional for negligence, in a claim for loss of chance, it must be shown that the client had lost something of value or whether on the contrary his prospects of success in the original action were negligible. The court will then assess what would have been the plaintiff's prospects of success had the original litigation been fought out and whether the act of negligence complained of did cause any damage to the plaintiff.*

LEGAL PROFESSION: *Negligence – Advocate and solicitor – Claim – Loss of chance – Alleged failure of advocate and solicitor appointed to exercise duties to client – Failure to ensure that suit or claim properly pursued before court and disposed of based on merits of claim – Whether advocate and solicitor breached duty of care to client based on standards expected from reasonably competent advocate and solicitor – Whether caused damage to client – Whether client had lost something of value – Whether prospects of success in original action negligible*

TORT: *Negligence – Advocate and solicitor – Claim – Loss of chance – Alleged failure of advocate and solicitor appointed to exercise duties to client – Failure to ensure that suit or claim properly pursued before court and disposed of based on merits of claim – Whether advocate and solicitor breached duty of care to client based on standards expected from reasonably competent advocate and solicitor – Whether caused damage to client – Whether client had lost something of value – Whether prospects of success in original action negligible*

The plaintiff had retained the services of the defendant, an advocate and solicitor, to institute a claim based on defamation against one Kimis Arumugam Nadar ('Kimis') and Makkal Osai Sdn Bhd ('Makkal Osai'). The defendant filed the plaintiff's claim. The suit against Makkal Osai was withdrawn with the plaintiff's consent and the claim proceeded solely against Kimis. The said suit was heard and dismissed on the broad grounds that: (i) the plaintiff had failed to plead the original language of the said alleged defamatory words; (ii) the plaintiff had failed to produce an interpreter or translator that would be able to inform the court of the original words that were published in the article and uttered by Kimis. The plaintiff did not file an appeal against the decision of the court. Instead, the plaintiff being unhappy with the results of the said suit, believed that the defendant had been negligent in the conduct of the aforesaid suit and claimed that he suffered damages because of the failure of the defendant to discharge the duties owed

A to the plaintiff. In this action, the plaintiff pleaded in his statement of claim that the defendant was negligent in failing to: (i) plead the alleged defamatory words in its original language; (ii) advice the plaintiff as to the need to plead the alleged defamatory words in its original language; (iii) obtain the services of a qualified interpreter to confirm that the words pleaded had been B translated properly and to give evidence at the trial to prove the said defamatory words; (iv) advise the plaintiff of the need to obtain the services of a qualified interpreter to give evidence at the trial to prove the said defamatory words; and (v) prove at trial that the words were defamatory as translated in Malay or in English. The defendant contended that he was not C negligent in the conduct of the said suit on behalf of the plaintiff for the following reasons: (i) the judge had also found that the defence of fair comment was available to Kimis; (ii) the failure to plead the original language was not fatal to the said defamation suit and did not cause any damage to the plaintiff; (iii) the plaintiff was advised of the need to obtain an interpreter or translator to prove the original words that were published D and the defamatory meaning as alleged but he had failed to follow the same; (iv) the plaintiff's evidence at trial was so poor that the chances of success were very poor; and (v) this suit was motivated by an ulterior motive to prevent the recovery of the sums to be paid by the plaintiff's son for the defendant's services and to ensure that the defendant did not assist the police E in a criminal investigation concerning the affairs of Persatuan Kontraktor India Malaysia. The issues that arose were: (i) whether the defendant had breached his duty of care to the plaintiff based on the standards to be expected from a reasonably competent advocate and solicitor; (ii) whether the defendant's failure to act in accordance with the above duty of care F caused damage to the plaintiff; and (iii) in a case where the claim revolved around the alleged loss of chance, whether the plaintiff had lost something of value or whether, on the contrary of his prospects of success in the original action were negligible.

G **Held (declaring defendant negligent and directing defendant to pay to plaintiff nominal damages):**

(1) It is trite that in a claim based on the tort of defamation for statements made not in the natural language of the court, the original statements in its original language must be reproduced together with a translation of the aforesaid statements into the language of the court. The failure to H plead the original words in Tamil in the statement of claim on behalf of the plaintiff by the defendant in the suit against Kimis showed that the defendant had acted negligently and had failed to discharge his duty as the plaintiff's advocate and solicitor in the aforesaid suit. A reasonably competent advocate and solicitor would have ensured that the pleadings I include the alleged defamatory statements in the original Tamil language. The failure to plead the original Tamil words was a breach of the duty of care owed by the defendant to the plaintiff. (paras 25, 30 & 33)

(2) Regarding the *ex-tempore* judgment, the said reliance was misplaced. An *ex-tempore* judgment is not final and may be amended and changed until such a time a final written judgment is handed down. The alleged finding that the defendant in those proceedings was entitled to the defence of fair comment did not appear in the final reasoning. This would have meant that this reasoning was not the reason why the suit was dismissed but was caused by the failure to plead the words in Tamil in the original language in the statement of claim and the failure to call an interpreter at trial. (paras 34 & 45)

(3) The defendant had not personally informed the plaintiff of the need to obtain the services of an interpreter. It was strange for the defendant to suggest that he had undertaken the translation of the impugned words through an individual by the name of 'Steven' when he drafted the statement of claim and at the same time did not produce such a person to support the plaintiff's case at trial. If he had in fact procured the services of the said Steven to translate the article at the time of drafting, then surely any fees payable to procure the services of Steven would have been inconsequential as the said person had already undertaken the works earlier. This alleged person was also not called by the defendant to support his assertion that a translation of the said work had been undertaken at the early stage. The defendant contended that this decision was attributable to the plaintiff's decision not to incur further costs and was reluctant to pay the interpreter's fees. However, the said explanation was not reliable since the plaintiff did pay the defendant in full the sum of RM50,000 as fees for bringing the claim and for the sum of RM3,000 as disbursements to be incurred for the said suit. It was unlikely that the plaintiff would have put his case at risk simply because of fees to be incurred for the services of an interpreter. (paras 52 & 54)

(4) If the plaintiff had a bad case, then the defendant should have informed the plaintiff and advised him not to pursue with the suit in the first place. There was no credible evidence to suggest that the claim for defamation instituted by the plaintiff through the defendant was bound to fail or was a bad case. There was no written advice given by the defendant to the plaintiff to warn him of the weaknesses in the case and that he should not pursue with the suit. This issue only came to the fore when the suit for negligence was instituted against the defendant. The allegation was merely an afterthought to deny liability after a suit for negligence was filed by the plaintiff. The issue of ulterior motive was also, at best, mere conjecture or afterthought on the part of the defendant. (paras 60-63 & 67)

(5) The plaintiff did not explain to this court the extent of the alleged defamation, did not produce the impugned article, and did not explain or provide evidence of the alleged defamation that was made against him. He could not show the amount of what would have been awarded

A if the suit was properly pleaded by the defendant. This should have been undertaken and explained by the plaintiff in support of his claim for damages. Hence, the plaintiff was only entitled to nominal damages because of the negligence of the defendant. On the issue of the claim for the return of the fees of RM50,000 and for the return of the
B disbursements paid, the evidence, especially the notes of proceedings, indicated that the defendant had undertaken substantial work for the plaintiff *albeit* negligently. The court was unable to grant the plaintiff a return of the said fees and disbursements paid. (paras 83 & 86-88)

Case(s) referred to:

C *Birmingham City Council v. Shakeel Afsar & Ors [2020] EWHC 864* ***(refd)***
Dr Chin Yoon Hiap v. Ng Eu Khoon & Ors And Other Appeals [1998] 1 CLJ 533 CA ***(refd)***
Hijau Biru Envirotech Sdn Bhd v. Tetuan Dzahara & Associates & Ors [2021] 1 CLJ 186 CA ***(refd)***
Karpal Singh Ram Singh v. DP Vijandran [2001] 3 CLJ 871 CA ***(not foll)***
D *Kitchen v. Royal Air Force Association [1958] 1 WLR 563* ***(refd)***
Lim Soh Wah & Anor v. Wong Sin Chong & Anor And Another Appeal [2001] 2 CLJ 344 CA ***(refd)***
Malaysian Motor Insurance Pool (administered by MMIP Services Sdn Bhd v. Murali Sandrakasan & Anor [2021] 11 MLJ 776 ***(refd)***
Mount v. Barker Austin [1998] PNLR 493 ***(refd)***
E *Nyo Nyo Aye v. Kevin Sathiaseelan Ramakrishnan & Anor And Another Appeal [2020] 5 CLJ 82 CA* ***(refd)***
Pang Yeow Chow v. Advance Specialist Treatment Engineering Sdn Bhd [2014] 8 CLJ 188 CA ***(refd)***
Shearn Delamore & Co v. Sadacharamani Govindasamy [2017] 2 CLJ 665 CA ***(refd)***
Shirt v. Shirt [2012] EWCA Civ 1029 ***(refd)***
F *Tenaga Nasional Bhd v. Tetuan Ariff & Co [2014] 1 CLJ 1112 HC* ***(refd)***
Tetuan Theselim Mohd Sahal & Co & Ors v. Tan Boon Huat & Anor [2017] 6 CLJ 368 CA ***(refd)***

For the plaintiff - Puvarasan Balaiyah & Syauqi Mardia; M/s Puvarasan & Assocs
For the defendant - Wong Hok Mun & Keshava Rajasekaran; M/s Wong Kian Kheong
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Reported by Lina E

JUDGMENT

Mohd Arief Emran Arifin JC:

H **Introduction**

[1] The plaintiff had retained the services of the defendant, an advocate, and solicitor, to institute a claim against Kimis a/l Arumugam Nadar and Makkal Osai Sdn Bhd for defamation.

I **[2]** The defendant had filed the plaintiff's claim against the said defendants with the Writ of Summons No. WA-23NCVC-43-10-2017 on 24 October 2017. The suit against Makkal Osai Sdn Bhd was subsequently withdrawn with the consent of the plaintiff and the claim proceeded solely against Kimis a/l Arumugam Nadar.

[3] The said suit was heard by way of a full trial and was dismissed by my learned brother, Justice Mohd Firuz bin Jaffril on 30 November 2018 with costs of RM25,000.

[4] My learned brother gave broad grounds, as seen in the written transcripts, for dismissing the said suit which is summarised as follows:

(i) That the plaintiff had failed to plead the original language of the said alleged defamatory words.

(ii) That the plaintiff had failed to produce an interpreter or translator that would be able to inform the court of the original words that were published in the article and uttered by Kimis a/l Arumugam.

(iii) Further, even if the said finding were incorrect, the said Kimis a/l Arumugam is entitled to rely on the defence of fair comment.

The said broad grounds were followed by the written grounds dated 30 November 2018.

[5] The plaintiff did not file an appeal against the decision of the court. Instead, the plaintiff being unhappy with the results of the said suit, believed that the defendant had been negligent in the conduct of the aforesaid suit and claims that he has suffered damages because of the failure of the defendant to discharge the duties owed to the plaintiff.

[6] The plaintiff, in his statement of claim, pleaded that:

(i) the defendant was negligent in failing to plead the alleged defamatory words in its original language (Tamil).

(ii) the defendant was negligent in failing to advice the plaintiff as to the need to plead the alleged defamatory words in its original language.

(iii) the defendant was negligent when he failed to obtain the services of a qualified interpreter to confirm that the words pleaded have been translated properly.

(iv) the defendant was negligent when he failed to obtain the services of a qualified interpreter to give evidence at the trial to prove the said defamatory words.

(v) the defendant was negligent when he failed to advise the plaintiff of the need to obtain the services of a qualified interpreter to give evidence at the trial to prove the said defamatory words.

(vi) the defendant was negligent when he failed to prove at trial that the words were defamatory as translated in Malay or in English.

[7] The defendant admits that he was retained by the plaintiff and did not deny that the suit was dismissed by the High Court. The defendant also relies on the judgment of my learned brother as contained in the broad grounds and in the written grounds delivered by my learned brother, Justice Mohd Firuz bin Jaffril.

[8] The defendant however contends that he was not negligent in the conduct of the said suit on behalf of the plaintiff for the following reasons:

(i) That the learned judge had also found that the defence of fair comment was available to Kimis a/l Arumugam.

(ii) That the failure to plead the original language is not fatal to the said defamation suit.

(iii) The failure to plead the original language of the said defamatory words did not cause any damage to the plaintiff.

(iv) The plaintiff was advised of the need to obtain an interpreter or translator to prove the original words that were published and the defamatory meaning as alleged, but he had failed to follow the same.

(v) The plaintiff's evidence at trial was so poor that the chances of success were very poor.

(vi) That this suit was motivated by an ulterior motive to prevent the recovery of the sums to be paid by the plaintiff's son for the defendant's services and to ensure that the defendant did not assist the police in a criminal investigation concerning the affairs of Persatuan Kontraktor India Malaysia.

Applicable Law

[9] I find that this is a typical case of professional negligence alleged against an advocate and solicitor or what is commonly referred to as a "loss of chance". This claim is based on the alleged failure of the advocate and solicitor appointed to exercise his duties to the client to ensure that the suit or the claim is properly pursued before the courts and disposed of based on the merits of the said claim.

[10] I refer to the judgment of Vazeer Alam Mydin Meera JC (as he then was) in *Tenaga Nasional Bhd v. Tetuan Ariff & Co* [2014] 1 CLJ 1112, where His Lordship stated:

> [18] It is settled that in a claim of this nature, in assessing damages arising from professional negligence of solicitors, the question is not whether the plaintiff would have succeeded in its claim against EPE; but rather whether the defendant's negligence has occasioned the plaintiff to lose a valuable right, cause of action, chance or opportunity to claim their loss. In *Lim Soh Wah & Anor v. Wong Sin Chong & Anor & Another Appeal* [2001] 2 CLJ 344; [2001] 2 AMR 2001, in a claim for damages against a firm of solicitors for negligence, the Court of Appeal held that negligence of the

appellant solicitor by reason of non attendance in court occasioned by the appellant's failure to diarise the respondents' case meant that the respondent in that case had lost a valuable right, which is the opportunity to convince the judge of first instance by way of oral testimony and documentary evidence, that they had a complete answer to the claim that had been brought against them. (See also the cases of *Tatab Industries Sdn Bhd (In Receivership) v. Su Thiam Hock @ Su Then Hack* [1994] 1 CLJ 544; *Kitchen v. Royal Air Forces Association and Others* [1958] All ER 241; and *Allen v. Sir Alfred McAlpine & Sons Ltd and other appeals* [1968] 1 All ER 543 – where similar questions were asked in determining the causal link between the act of negligence and issue of damages). It is the loss of chance of recovery of damages in the dismissed action that determines the issue of damages and not the prospect of success in that dismissed action. In fact in the case of *Sykt Siaw Teck Hwa Realty & Developments Sdn Bhd v. Malek & Joseph Au* [1999] 3 CLJ 184; [1999] 5 MLJ 588 the court held that it was indeed mischievous and unethical of the solicitor to justify his breach of duty of care by raising the question of the merit of the client's appeal and its lack of prospect of success in order to defeat the client's claim for damages in an action for negligence. In *Allen v. Sir Alfred McAlpine & Sons Ltd and other appeals* [1968] 1 All ER 543 Lord Denning MR speaking for the English Court of Appeal held that when an action is dismissed as a result of a solicitor's negligence, the client:

> ... in a subsequent action for negligence against his solicitor can recover, in addition to the costs of the action which has been dismissed, compensation for the loss of his chances of recovering damages against the defendant in the dismissed action had been properly conducted on his behalf by the solicitor.

[19] Further, in *Sharif and others v. Garret & Co (a firm)* [2001] 3 All ER 195, the respondent firm of solicitors were sued in negligence when its client's case was struck out for want of prosecution. The Court of Appeal of England and Wales, laid down a two-tier approach to the assessment of damages. Simon Brown LJ speaking for the Court of Appeal held as follows:

> *In stating the principles generally applicable to this class of case, I indicated in Mount v. Barker Austin (a firm) [1998] PNLR 493 at 510, 511 a two-stage approach. First, the court has to decide whether the claimant has lost something of value or whether on the contrary his prospects of success in the original action were negligible. Secondly, assuming the claimant surmounts this initial handle, the court must then 'make a realistic assessment of what would have been the plaintiff's prospects of success had the original litigation been fought out'.*
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> With regard to the first stage, the evidential burden rests on the negligent solicitors: they, after all, in the great majority of these cases will have been charging the claimant for their services and failing to advise him that in reality his claim was worthless so that he would be better off simply discontinuing it. The claimant, therefore, should be given the benefit of any doubts as to whether or not his original claim was doomed to inevitable failure. With

A regard to the second stage, the *Armory v. Delamirie* (1722) 1 Stra 505, [1558-1774] All ER Rep 121 principle comes into play in the sense that the court will tend to assess the claimant's prospects generously given that it was the defendant's negligence which has lost him the chance of succeeding in full or fuller measure.

B [20] I find that the approach taken by the Court of Appeal of England and Wales in *Sharif and others v. Garret & Co (a firm) (supra)* in assessing damages in a claim for solicitor's professional negligence is both practical and useful. In fact the initial determination of the question of whether the claimant has lost something of value as a result of his solicitor's breach of duty has been applied by our Court of Appeal in *Lim Soh Wah & Anor*
C *v. Wong Sin Chong & Anor (and Another Appeal)* [2001] 2 CLJ 344; [2001] 2 AMR 2001. (emphasis added)

[11] I also refer to the decision of Gopal Sri Ram JCA (as he then was) in *Lim Soh Wah & Anor v. Wong Sin Chong & Anor And Another Appeal* [2001] 2 CLJ 344.

D **[12]** In that case, His Lordship eruditely stated:

That returns us to the present appeal. Now, we must confess that despite the careful argument presented by counsel for the appellant, we formed the view that causation had been established. As pointed out by counsel for the respondents, this is a case where the clients lost an opportunity
E to convince the judge by way of oral testimony and documentary evidence that they had a complete answer to the claim that had been brought against them. In fact, Dato' Wrigglesworth was able to demonstrate to a conviction that the appellant had not prepared his clients' case with the care and attention it deserved. Vital links in the evidence were omitted by a singular failure to pursue the proper line of
F inquiry, especially in regard to the relevant documentary evidence. If the appellant solicitor had informed the respondents of the hearing date and had prepared himself properly for the trial, he would have been able to persuade the judge that they had a complete answer to the claim that had been brought against the respondents. Accordingly, this is a case where
G the respondents lost a valuable right – the right to persuade a judge of first instance by way of oral and documentary evidence – by reason of the appellant's oversight of the notice of hearing that had been given by the court. It is an unfortunate turn of events which we are certain the solicitor did not wish upon his clients. But it happened. And for that the solicitor must answer in a claim for negligence.

H Advocates and solicitors undertake an onerous task when they agree to act for a client. There is an assumption of responsibility by the solicitor coupled with reliance by the client on the skill of the solicitor. The solicitor's duty to exercise reasonable care and skill is imposed both by contract and by the law of tort. Here, we need do no more than quote
I the words of Lord Goff in *Henderson & Ors. v. Merrett Syndicates Ltd. & Ors.* [1994] 3 All ER 506, 530:

The judgment of Oliver J in *Midland Bank Trust Co Ltd v. Hett Stubbs & Kemp (a firm)* [1978] 3 All ER 571, [1979] Ch 384 provided the first analysis in depth of the question of concurrent liability in tort and contract. Following upon *Esso Petroleum Co Ltd v. Mardon* [1976] 2 All ER 5; [1976] QB 801, it also broke the mould, in the sense that it undermined the view which was becoming settled that, where there is an alternative liability in tort, the claimant must pursue his remedy in contract alone. The development of the case law in other common law countries is very striking. In the same year as the *Midland Bank Trust* case, the Irish Supreme Court held that solicitors owed to their clients concurrent duties in contract and tort: see *Finlay v. Murtagh* [1979] IR 249. Next, in *Central Trust Co v. Rafuse* [1986] 31 DLR (4th) 481 Le Dain J, delivering the judgment of the Supreme Court of Canada, conducted a comprehensive and most impressive survey of the relevant English and Canadian authorities on the liability of solicitors to their clients for negligence, in contract and in tort, in the course of which he paid a generous tribute to the analysis of Oliver J in the *Midland Bank Trust* case. His conclusions are set out in a series of propositions (at 521-522); but his general conclusion was to the same effect as that reached by Oliver J. He said (at 522):

> A concurrent or alternative liability in tort will not be admitted if its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort. Subject to this qualification, where concurrent liability in tort and contract exists the plaintiff has the right to assert the cause of action that appears to be the most advantageous to him in respect of any particular legal consequence.

[13] The burden that lies on the shoulder of an advocate and solicitors or any professional to act in the best interest of a client is reflected in the decisions of the Court of Appeal in *Shearn Delamore & Co v. Sadacharamani Govindasamy* [2017] 2 CLJ 665 and *Tetuan Theselim Mohd Sahal & Co & Ors v. Tan Boon Huat & Anor* [2017] 6 CLJ 368.

[14] Harmindar Singh Dhaliwal JCA (as His Lordship then was) stated in *Tetuan Theselim Mohd Sahal v. Tan Boon Huat* (*supra*):

> [29] The final finding which was also attacked was with regard to the failure by the defendants to advise the plaintiffs as to the progress of the transaction and also for unprofessional conduct. A glaring omission, which appeared to have been overlooked all round, was that no evidence was adduced to show the appropriate standard of care, competence and diligence which the defendants should be held up to in conveyancing practice. A solicitor, like all professionals, has a duty to exercise reasonable degree of care and skill expected of a competent and reasonably experienced solicitor. In exercising reasonable care and skill, one must act with integrity and diligence (see *Sri Alam Sdn Bhd v. Tetuan Radzuan Ibrahim & Co* [2010] 1 CLJ 913; [2010] 1 MLJ 284).

A [30] Thus, whether the first defendant, and in particular the second defendant, who was the solicitor handling the transaction, were negligent may be determined by a consideration of the following questions:

(i) whether the standard of care practised by the second defendant was the same standard of reasonably competent solicitors in
B conveyancing practice; and

(ii) whether the second defendant had acted with diligence in exercising the reasonable care and skill expected to assist the completion of the SPA.

[15] Hamid Sultan Abu Backer JCA held in *Shearn Delamore & Co*
C *v. Sadacharamani Govindasamy* [2017] 2 CLJ 665:

[11] In relation to professionals, the standard of care expected is that of a reasonable practitioner in that profession and not merely that of an ordinary reasonable man. In the Federal Court decision of *Swamy v. Matthews & Anor* [1967] 1 LNS 174; [1968] 1 MLJ 138 at p. 139 by FC
D Barakbah LP and we quote:

> Now on the law. A man or a woman who practises a profession is bound to exercise that care and skill of an ordinary competent practitioner in that profession – be it the profession of an accountant, a banker, a doctor, a solicitor or otherwise. In the case
E of *Lanphier v. Phipos Tindal* CJ laid down this principle:
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> Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your case nor does a surgeon undertake that he will perform a cure; nor does he undertake to use the highest, degree of skill.
F There may be persons who have higher education and greater advantages than he has; but he undertakes to bring a fair, reasonable and competent degree of skill.

[12] In negligence case, there are *inter alia* three elements which need to be pleaded and established. However, in professional negligence case
G there is a fourth element which must be pleaded and proved and that is related to standard of care. Support for the proposition is found in a number of cases which learned counsel for the appellant has summarised as follows:

Standard of Care of Professionals – Generally

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> In relation to professionals, the standard of care expected is that of a reasonable practitioner in that profession and not merely that of an ordinary reasonable man. This dichotomy was clearly observed in *Shalini Kanagaratnam v. Pusat Perubatan Universiti Malaya & Anor* [2016] 6 CLJ 225.

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> In the case of lawyers, as professionals, the standard of care expected appears well settled. In *Arthur JS Hall & Co v. Simons* [2002] 1 AC 615, Lord Hobhouse of Woodborough made the following observations:

The *standard of care* to be applied in negligence actions against an advocate is the same as that applicable to any other skilled professional who has to work in an environment where decisions and exercises of judgment have to be made in often difficult and time constrained circumstances. *It requires a plaintiff to show that the error was one which no reasonably competent member of the relevant profession would have made. This is an important element of protection against unjustified liabilities.*

Again in the oft-quoted case of *Midland Bank Trust Co Ltd & Anor v. Hett, Stubbs & Kemp* [1978] 3 All ER 571, Oliver J held as follows:

It may be that a particularly meticulous and conscientious practitioner would, in his client's general interests, take it on himself to pursue a line of enquiry beyond the strict limits comprehended by his instructions. But that is not the test. *The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession,* and cases such as *Duchess of Argyll v. Beuselinck, Griffiths v. Evans* and *Hall v. Meyrick* demonstrate that the duty is directly related to the confines of the retainer.

In *Wong Kiong Hung & Anor v. Chang Siew Lan (f)* [2009] 3 CLJ 751; [2009] 4 MLJ 183, Low Hop Bing JCA, delivering the judgment of the Court of Appeal, observed that:

A man or a woman who practises a profession is bound to exercise the care and skill of an ordinary competent practitioner in that profession – be it the profession of … a solicitor or otherwise: *Swamy v. Matthews & Anor* [1967] 1 LNS 174; [1968] 1 MLJ 138 (FC), per Barakbah LP (as he then was) at p 139, applying *Lanphier v. Phipos* (1838) 8 Car & P 475; 173 ER 581 where Tindal CJ laid down this principle:

Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your case, … nor does he undertake to use the highest degree of skill … but he undertakes to bring a fair, reasonable and competent degree of skill.

In *Sri Alam Sdn Bhd v. Tetuan Radzuan Ibrahim & Co (sued as a firm)* [2010] 1 CLJ 913; [2010] 1 MLJ 284, Harminder J (as he then was) made similar observations:

… it is now accepted that advocates and solicitors owe concurrent duties in contract and in tort (*Midland Bank Trust Co Ltd & Anor v. Hett, Stubbs & Kemp (a firm)* [1979] Ch 384; *Saif AH v. Sydney Mitchell*). *Their duty is to exercise reasonable degree of care and skill as with all professions. He or she is to be judged by what reasonably competent practitioners would do* although a lawyer is to be judged according to the standards of practitioners of his own standing and seniority.

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> Thus, the standard of care expected of advocates and solicitors is a reasonable degree of care and skill judged according to what a reasonably competent practitioner would have done. The law does not demand that advocates and solicitors act according to the highest degrees of care and skill. (emphasis added)

B **[16]** I also refer to the decision of the Court of Appeal in *Pang Yeow Chow v. Advance Specialist Treatment Engineering Sdn Bhd* [2014] 8 CLJ 188, where Hamid Sultan JCA stated on a claim relating for a loss of chance:

> [7] There are authorities to suggest that in a case of this nature the respondent still has to prove his case against the third party on the balance
C of probabilities. This was not done in this case. In *Sharif & Ors v. Garrett & Company* [2002] 1 WLR 3118, the court with similar issues had relied on Lord Justice Simon Brown in *Mount v. Barker Austin* [1998] PNLR 510/511, where His Lordship had summarised the relevant consideration as follows:
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> D (i) The legal burden lies on the plaintiff to prove that in losing the opportunity to pursue his claim, he has lost something of value *ie*, that his claim (or defence) had a real and substantial rather than merely a negligible prospect of success.
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> (ii) The evidential burden lies on the defendants to show that despite their having acted for the plaintiff in the litigation and charged for
E their services, that litigation was of no value to their client, so that he lost nothing by their negligence in causing it to be struck out. Plainly the burden is heavier in a case where the solicitors have failed to advise their client of the hopelessness of his position. If, of course, the solicitors have advised their client with regard to the
F merits of his claim (or defence) such advice is likely to be highly relevant.
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> (iii) If and insofar as the court may now have greater difficulty in discerning the strength of the plaintiff's original claim than it would have had at the time of the original action, such difficulty should not count against him, but rather against his negligent solicitors. It
G is quite likely that the delay would have caused such difficulty and quite possible, indeed, that is why the original action was struck out in the first place. That, however, is not inevitable: it will not be the case in particular (a) where the original claim (or defence) turned on questions of law or the interpretation of documents, or (b) where the only possible prejudice from the delay can have been to the
H other side's case.
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> (iv) If and when the court decides that the plaintiff's chances in the original action were more than merely negligible, it will then have to evaluate them. That requires the court to make a realistic assessment of what would have been the plaintiff's prospects of
I success had the original litigation been fought out. Generally speaking one would expect the court to tend towards a generous assessment given that it was the defendants' negligence which lost the plaintiff the opportunity of succeeding in full or fuller measure.

> These principles are largely taken from the leading cases of *Kitchen v. Royal Air Force Association* (1958) 1 WLR 563 and *Allied Maples Group Ltd v. Simmons and Simmons* (1995) 1 WLR 1602 and have been applied in a number of cases to which we were referred. But there is no authority which gives any guidance as to how the court should approach its task in a case where the original claim has been struck out because a fair trial of the issue or issues in question was no longer possible as a result of delay by the Claimant's solicitors. We have been asked to give guidance because we are told that such cases are typical of those made against solicitors.

[17] It is also important that I note that for a litigant to be successful in a claim against a professional for negligence, in a claim for loss of chance, it must be shown that the client had lost "something of value or whether on the contrary his prospects of success in the original action were negligible". I must also assess "what would have been the plaintiff's prospects of success had the original litigation been fought out".

[18] I must also consider whether the act of negligence complained of did cause any damage to the plaintiff. I once again refer to the judgment of Vazeer Alam Mydin Meera JC in *Tenaga Nasional Bhd v. Tetuan Ariff & Co (supra):*

> [16] Damage is an essential element in a cause of action for negligence (see *Pegasus Management Holdings SCA and another v. Ernst & Young (a firm) and another* [2010] EWCA Civ 181, CA; and *Law Society v. Sephton & Co (a firm) and others* [2006] 2 AC 543, HL). In this regard, the plaintiff must show loss to have actually occurred and that it is recoverable before an award of damages can be made (see *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 and *Penang Port Commission v. Kanawagi Seperumaniam (No. 1)* [1997] 1 CLJ 423; [1996] 3 MLJ 427). Therefore, in order to found a case in negligence, it is necessary for the plaintiff to prove that it has suffered damages that are recoverable and establish the causal link between the defendant's breach of duty and the plaintiff's loss.

[19] I further refer to the judgment of Harmindar Singh JCA (as he then was) in *Tetuan Theselim Mohd Sahal v. Tan Boon Huat* (*supra*) on the issue of causation, where His Lordship explained:

> [32] In this respect as well, we are compelled to note that there was no inquiry as to whether it was the first defendant's breach of duty which led to the losses sustained. *The law requires a causal connection between breach of duty and injury suffered before liability is established in an action for negligence. In other words, was the defendant's act the effective cause of the harm suffered by the plaintiff? In this respect, the courts look to the test of causation known commonly as the "but for" test* (see *Elizabeth Chin Yew Kim & Anor v. Dato' Ong Gim Huat & Other Appeals* [2017] 2 CLJ 274; [2017] 1 MLJ 328; *Chua Seng Sam Realty Sdn Bhd v. Say Chong Sdn Bhd & Ors & Other Appeals* [2012] 7 CLJ 337; [2013] 2 MLJ 29 and *Ngan Siong Hing v. RHB Bank Bhd* [2014] 3 CLJ 984; [2014] 2 MLJ 449).

A [33] *The "but for" test simply means that "but for" the defendant's negligent act, the harm would not have occurred. Applying the "but for" test in the present case, the question is whether the plaintiffs' damage would have accrued but for the defendants' negligence.* In our view, the proximate cause of the plaintiffs' losses is the failure of the plaintiffs to obtain the financing and to settle the balance purchase price within the agreed period. That had nothing to B do with the defendants as solicitors. It was indeed a matter entirely within the control of the plaintiffs and the bank. In other words, there was no nexus between the exercise of care and skill by the defendants as solicitors to the granting or otherwise of the loan facility. As such, it must follow that the plaintiffs have failed, in this respect, to establish liability on the part of the defendants. (emphasis added)

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[20] Another important consideration that I must address is whether the defendant has shown the standard expected of a reasonably competent advocate and solicitor representing a similar client or facing similar circumstances. This may require the evidence from an advocate and solicitor to explain the standards to be expected of the said advocate. One could see D this in a negligence suit in relation to a claim against a doctor or an architect. The same kind of evidence is expected in a claim against an advocate and solicitor. However, this may not be necessary in all cases and will depend on the facts of each case and the claim put forward against an advocate. I refer to the decision of the Court of Appeal in *Nyo Nyo Aye v. Kevin Sathiaseelan* E *Ramakrishnan & Anor And Another Appeal* [2020] 5 CLJ 82.

[21] Guided by the above authorities, I am of the opinion that the following issues must be considered by this court:

(i) whether the defendant had breached his duty of care to the plaintiff F based on the standards to be expected from a reasonably competent advocate and solicitor;

(ii) whether the defendant's failure to act in accordance with the above duty of care did cause damage to the plaintiff; and

G (iii) in a case where the claim revolves the alleged loss of chance, I have to decide whether the plaintiff (a) "has lost something of value or whether on the contrary his prospects of success in the original action were negligible," and (b) if the plaintiff passes the threshold, I must then "make a realistic assessment of what would have been the plaintiff's prospects of success had the original litigation been fought out".

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Application Of The Law To The Facts At Hand

Whether The Defendant Had Breached Of His Duty Of Care To The Plaintiff Based On The Standards To Be Expected From A Reasonably Competent Advocate And Solicitor

I

Failure To Plead In Its Original Language

[22] As I have stated earlier, the plaintiff alleges that the defendant was negligent by failing:

(i) To plead the alleged defamatory words in its original language (Tamil). A

(ii) To advice the plaintiff as to the need to plead the alleged defamatory words in its original language.

(iii) To obtain the services of a qualified interpreter to confirm that the words pleaded have been translated properly. B

(iv) To obtain the services of a qualified interpreter to give evidence at the trial to prove the said defamatory words.

(v) To advise the plaintiff of the need to obtain the services of a qualified interpreter to give evidence at the trial to prove the said defamatory words. C

(vi) To prove at trial that the words were defamatory as translated in Malay or in English.

[23] I will first deal with the issue of the alleged failure by the plaintiff to plead the alleged defamatory words in its original language in the original action against Kimis a/l Arumugam Nadar and Makkal Ossai Sdn Bhd. I do note that the said original suit against Makkal Ossai Sdn Bhd was subsequently withdrawn by the plaintiff and this withdrawal does not constitute part of the alleged claim against the defendant. D

[24] In this case it is clear that the defendant had failed to plead the original article and the defamatory words in its original language. The statement of claim had only pleaded the alleged words in Malay and not in Tamil. Parties agreed that the said original words were published in Tamil and subsequently repeated in Makkal Ossai Newspaper in Tamil. E

[25] It is trite that in a claim based on the tort of defamation for statements made not in the natural language of the court, the original statements in its original language must be reproduced together with a translation of the aforesaid statements into the language of the court. For example, if the statements were made in Tamil or Korean, then the said statements must be reproduced in the original language and translated into Malay in the statement of claim. F G

[26] I refer to *Karpal Singh Ram Singh v. DP Vijandran* [2001] 3 CLJ 871, where Abdul Hamid Mohamad JCA stated on the issue of the need to plead the alleged defamatory words in its original language: H

> I will now discuss the position where the language of the statement is in a foreign language and not the language of the court.
>
> We will first look at the Malaysian authorities. In *Hassan & Anor v. Wan Ishak & Ors* [1960] 1 LNS 34; [1961] 27 MLJ 45 the alleged defamatory words were spoken in Malay, not the language of the court at that time, which was English. Those words in Malay were not set out in the statement of claim. However, the then Court of Appeal held that that was not fatal. I

A In *Lim Kit Siang v. Datuk Dr. Ling Liong Sik* [1975] 5 MLJ 523, it is clear that the alleged statement was not spoken "in the language of the court." The language of the court must be Malay and the language spoken must be other than Malay: The learned Judicial Commissioner (as she then was) held that the "exact words as uttered ... must be reproduced in the original language with a certified translation in the language of the court, B in the absence of which the claim will fail."

In *Workers' Party v. Tay Boon Too* [1975] 1 LNS 193; [1975] 1 MLJ 47 (Singapore High Court) the alleged defamatory words were spoken in Hokkien and in Singapore the language of the court is English. Chua J held that the alleged statement "must be set out in the statement of claim C in the foreign language precisely as spoken and followed by a literal translation. It is not enough to set out the translation without setting out the original or *vice versa*." The learned judge relied on *Gatley on Libel and Slande*r.

The position in England is as stated by *Gatley* relied on by Chuah J above.

D So, besides the Court of Appeal judgment in *Hassan & Anor v. Wan Ishak & Ors* [1960l 1 LNS 34; [1961] 27 MLJ 45, authorities are clear that the statement must be set out in the original language in the statement of claim. I prefer that view.

I shall now come to the question of translation. Again, in *Hassan & Anor* E *v. Wan Ishak & Ors* [1960l 1 LNS 34; [1961] 27 MLJ 45 where the original words in Malay were not pleaded and therefore there was no translation into the language of the court, Thomson CJ said that as a matter of practice "those words should be set out in their original form in the pleadings and in addition a translation of them into the language of the court should be pleaded." However, the court held that failure to do so F was not fatal. The learned Chief Justice in fact relied on the opinions of the other two judges, who were Malays, and who were more familiar with the Malay language than he was.

In *Lim Kit Siang v. Datuk Ling Liong Sik & Ors.* [1975] 5 MLJ 523 the learned Judicial Commissioner (as she then was) insisted on a "certified G translation". I must add a note here that the original language of the alleged statement is not known. It could quite likely be Mandarin.

The same position is taken by Chuah J in *Workers' Party v. Tay Boon Too* [1975] 1 LNS 193; [1975] 1 MLJ 47 (Singapore High Court) where the original language spoken was Hokkien.

H In England, the authorities insist that there must be a "literal translation."

[27] It is this decision that the defendant relies on to argue that his failure to plead the said defamatory words in its ordinary language is not fatal. He also relies on the broad grounds of my learned brother, as seen from the recorded transcript, that Justice Mohd Firuz bin Jaffril stated:

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> As the Plaintiff did not include the words actually published in the Statement of Claim (inaudible) ... I find that it is not fatal but the failure to provide a translation by calling an interpreter sworn in as a witness to prove that fact is fatal.

[28] I must also consider the grounds of my learned brother dated 30 November 2018 where he stated:

> As the Plaintiff did not include the words actually published in the Statement of Claim and also failed to prove its translation, I am constraint to hold that the Plaintiff has failed to discharge the burden of proof as required under Section 101 of the Evidence Act.

[29] I understand that the defendant contends that the failure to plead the Tamil words that appeared in the Makkal Osai article and in the alleged media statement is not fatal to the plaintiff's case. As I have stated earlier, he relies on the above judgment of the Court of Appeal in *Karpal Singh v. DP Vijandran* (*supra*) and on the notes of the proceedings allegedly indicating that the High Court had also earlier found that the said failure is not fatal.

[30] I am however of the opinion that the failure to plead the original words in Tamil in the statement of claim on behalf of the plaintiff by the defendant in the suit against Kimis a/l Arumugam Nadar shows that the defendant had acted negligently and had failed to discharge his duty as the plaintiff's advocate and solicitor in the aforesaid suit. I find that a reasonably competent advocate and solicitor would have ensured that the pleadings include the alleged defamatory statements in the original Tamil language. As I have referred to earlier, this is a trite principle of law and should have been complied with by the defendant. The defendant should have taken heed of the decisions of our superior courts in the discharge of his duties to the plaintiff.

[31] As I have alluded earlier, the defendant suggests that the said failure is not fatal. However, one must note that the decision of the Court of Appeal in *Karpal Singh v. DP Vijandran* (*supra*), was concerning a newspaper article and press statements that were published in English, a language that is dominant in our courts, but was only produced in Malay in the pleadings and the original article was also published.

[32] Therefore, the court when faced with the alleged defamatory statements were not in a disadvantaged position to ascertain the said words and consider whether they were potentially defamatory. One could see this from the following excerpts of the judgment of the Court of Appeal:

> In approaching this issue I am of the view that the court should be pragmatic. No doubt Malay is the National Language of the country and by law, the language of the court. English used to be the language of the court in this country previously. However the position of the English language in Malaysian courts remains the dominant language of law and

A the court in this country. In practice, lawyers and judges refer to the English version of an Act of Parliament to know the law even though the Malay version is the authoritative text. Lawyers and judges, especially in the higher courts usually refer to the "translated" English version of the pleadings. (The truth is the Malay version is the translated version). Arguments, written or oral, are mostly in English, as in this case. B Judgments in English, be they local or foreign, are quoted and read, without any translation into Malay. Documents in English produced in court, enclosed in affidavits or through witness giving oral evidence need not be translated into Malay. Judgments, especially of the superior courts are mostly written in English. They are quoted, read and argued without any translation into Malay. Judgments written in Malay contain passages C in English without any translation, and *vice versa*. The judgments, be they in English or Malay, are quoted, read and argued on without any translation. The proceedings, the lawyers, the judges, the judgments are in fact bilingual – *ie*, both in English and Malay. **So, the position of the English language in Malaysian court is different from that of another** D **language be it Mandarin or Tamil.**

Furthermore, the position in Malaysian courts regarding the language of the court is different from that in England or even Singapore. Unlike in England and Singapore, in Malaysia Malay and English are used interchangeably in the proceedings and both are understood by lawyers and judges alike.

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In this case, the press statement and the press report were in English. The material words were quoted in the statement of claim. The lawyers and the judges understand them perfectly well, probably better than the certified interpreters. Anyway, a translation is given in Malay which, (though not a certified translation), is not disputed that it is correct. We, F the judges who are in a better position than Thomson CJ in *Hassan & Anor v. Ishak & Anor* [1961] 27 MLJ 45, know they are correct, even though we need not even rely on the translation to understand the impunged words.

(emphasis added)

[33] Therefore, I find that the failure to plead the original Tamil words is G fatal to the plaintiff's claim and is clear evidence of the breach of the duty of care owed by the defendant to the plaintiff.

Ex Tempore Judgments And Written Judgments – Which Is Binding

[34] Regarding the plaintiff's reliance on the alleged broad grounds and the H *ex-tempore* judgment of my learned brother Justice Mohd Firuz bin Jaffril, I find that the said reliance is misplaced. A judge's *ex-tempore* judgment is not final and may be amended and changed until such a time a final written judgment is handed down.

[35] I refer to the decision of Warby J in *Birmingham City Council v. Shakeel* I *Afsar & Ors* [2020] EWHC 864, where on the issue of finality of judgments:

36. In none of these cases was there an application such as the Waiver Application here: to vary or amend a judgment that had been handed down, after circulation of a draft and representations about the draft. May LJ emphasised this point in *Robinson v. Fernsby* at [86]: "The judge ... did not ... alter a judgment that had been given." But the cases do contain instructive statements of principle. *Robinson v. Fernsby* is the most recent of the four cases, and the most helpful. The Court considered all three of the earlier cases. I would draw the following principles from the decision:

(1) The introduction of the CPR did not affect the long-settled principle that a judge has power to recall, reconsider and alter an order made after he had given judgment at any time before the order is drawn up and sealed: [76], [78] [82], [113], [120].

(2) The exercise of the jurisdiction generally requires exceptional circumstances or strong reasons, though there may be circumstances in which it must be exercised in the interests of justice: [83-86], [113], [120].

(3) Those criteria apply to the alteration of a draft judgment which has been circulated to the parties before being handed down: [96].

(4) The same criteria apply, with greater force, where the judgment is a formal written judgment in final form handed down after the parties have been given the opportunity to consider it and make representations on the draft; there are obvious reasons – including the desirability of finality – why the court should hesitate long and hard before making a material alteration to such a judgment: [80], [94].

(5) The question whether to exercise the jurisdiction can only depend on the circumstances of the particular case: [96].

(6) The decision in a particular case is an exercise of judicial discretion which will only be interfered with on appeal on the usual grounds for discharging a discretionary decision: [98].

37. It has been submitted by the claimants that it would be wrong in principle not to "reinstate" the passage which is the subject of the application here. The principle relied on appears to be that the Court is duty bound to take such action if it has removed a passage from a draft judgment, on which an intending appellant might reasonably seek to rely. I disagree with the principle, which seems to me to be far too broad. Nor am I persuaded that it would apply on the facts of this case. It is not suggested, nor do I consider, that the decision to edit the draft judgment as I did was wrong in principle. No settled intention to appeal has been expressed by the claimant, even four months after the Trial Judgment. No grounds of appeal have been identified. I am currently unable to identify any grounds of appeal that would have a *Mr Justice Warby Birmingham City Council v. Afsar (No 4)* [20 864 20 Approved Judgment] EWHC (QB) real prospect of success. Like Counsel for the defence, I have difficulty in understanding how the passage would lend material assistance to any appeal. If I have understood the argument correctly, it seems to me that

the relevant ground of appeal could adequately be advanced on the basis of the evidence led at trial, without the need to rely on the passage in question. I expand on this point in the Private Judgment. For all these reasons, I do not consider that it is necessary in the interests of justice to revoke my earlier discretionary decision.

38. Accordingly, as it seems to me, the least stringent test I should apply is that of exceptional circumstances or strong grounds. Applying that test, I would dismiss the application. In the exercise of my discretion, I decided that a passage in the draft judgment was not necessary to my decision and, for reasons that are known to the parties, I concluded that it was better that it be removed. As the defendants have submitted, the claimants have failed to show exceptional or strong grounds for revoking that decision.

39. But in my judgment the authorities are distinguishable, indeed *the time-honoured principle considered in the authorities I have cited can have no application in the present case. That is for three reasons. First, because the principle is concerned with altering judgments and orders before they are sealed. The Final Order in this case was drawn up and sealed several months ago. True, there were some further matters to be addressed. But these were confined to the Persons Unknown issue. Otherwise, the Final Order was indeed final. Secondly, the present application, unlike those in In re Barrell, Abacha and Robinson v. Fernsby, does not seek to amend the substance of the Court's decision or order in the relevant proceedings; the application is to amend the wording of Trial Judgment, with no consequential effect on the outcome of the trial or the Final Order. Thirdly, unlike Stewart v. Engel, the application does not seek amendment of the claimant's case; it seeks to amend the Trial Judgment.*

40. A more relevant authority, in my view, is *R (Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs (No 2) (Guardian News and Media Ltd & ors intervening)* [2010] EWCA Civ 158 [2011] QB 218. The claimant, Binyam Mohamed, sought judicial review of a refusal to disclose evidence which he claimed would show that he had been tortured by or on behalf of the US Government. The Divisional Court acceded to an application by the Foreign Secretary to redact some passages from its judgment, on grounds of national security. On a subsequent application it agreed, in the light of fresh evidence, to restore those paragraphs. The Foreign Secretary appealed. The Court of Appeal decided to dismiss the Foreign Secretary's appeal. It circulated a draft judgment giving effect to that decision. Representations made by letter by Counsel for the Foreign Secretary led to a paragraph of the draft judgment of Lord Neuberger being amended. At the hand down, it became apparent that by accident some of the other Counsel had not seen the representations or had the chance to comment before the amendment. Further, the letter of representation had been widely circulated, had attracted huge public attention, and was about to be published. The question arose of whether, in the circumstances, confidentiality in the text of the original draft of the paragraph concerned should be waived. In a supplemental judgment the Court held that, exceptionally, this would be done, in order to dispel any damaging myth or lingering public perception that a minister or his Counsel had been permitted to interfere with the judicial process. (emphasis added)

[36] I also refer to the decision of the English Court of Appeal in *Shirt v. Shirt* [2012] EWCA Civ 1029, where McFarlane MR stated: A

The correction of the transcript of the judgment;

32. I referred to the fact that this was all subject to one point. On 17 December 2010, as I have mentioned, two months after the hearing concluded, the Judge gave an oral reserve judgment. However, after getting the transcript, he then amplified the judgment in significant respects, and Mr McNall complains about those amplifications. B

33. In my view, it is open to a Judge who gave judgment immediately after a hearing, to make amendments to the transcript after he receives it, not only to the punctuation and syntax, sentence construction and order of sentences, to improve the elegance and comprehensibility of his judgment; he can also add to it by way of amplifying and clarifying findings, and indeed amplifying and clarifying the reasoning, recorded in his oral judgment. C

34. It seems to me that this is justifiable for grounds of principle and practice. So far as principle is concerned, it seems to me that there is nothing objectionable in a Judge making his reasoning clearer and more full. Indeed it is of assistance, and fairer, to the parties if he has the opportunity to do so, and indeed it assists on any appeal. D

35. As far as practicality is concerned, *if the law is too constraining on judges improving their ex tempore judgments, then they will be loathe to give ex tempore judgments. The delay caused by reserved judgments, and the extra time required from judges to prepare reserved judgments, are such that we should not discourage judges from giving ex tempore judgments.* E

36. Once one accepts that it is open to a judge to amplify his judgment in this way, if he gives the judgment ex tempore, it seems to me very difficult to avoid the conclusion that, if a judge chooses to give oral judgment some time after the hearing, he should have the similar opportunity to amplify and improve the judgment when he receives it back in transcript form. F

37. However, I should make two points in relation to these observations. The first is that to amplify and improve is one thing; to make new or contradictory points, *ie*, additional or contradictory to what was in the original judgment, is quite another. If a judge does have second thoughts after receiving a transcript, he should consider particularly carefully whether to include something wholly new, or something actually contradictory, to what he said in his *ex tempore* judgment. But if the judge does decide that he ought to include some such material, then he should make it clear on the face of the transcript what he has done. G H

38. The second qualification which has particular reference to this case is that if significant amplifications and clarifications are made to a judgment not given ex tempore, ie, immediately after the hearing, but sometime after the hearing, then it is almost inevitable that at least one of the parties, most likely the losing party, will be concerned as to what has happened, and will wonder if the judge really had concentrated on the issues when he gave his reserve judgment orally. In such a case, it is inevitable that, if there is an appeal the appellate court will look at the reasoning in the judgment particularly carefully. I

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> 39. The course taken by the judge in this case was not one which I regard as generally desirable. I put it in that slightly loose way because the particular circumstances of the case and the pressures on a judge in the particular case, may render such a course as the judge took in this case hard to avoid. Having said that, it is, in my view, a course that is better avoided.

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> 40. Having made those points, it is right to say that having considered the judgment in this case, I do not consider that the significant clarifications and amplifications which the judge made have caused any injustice. *He has not added any new (let alone any contradictory) material, or made any new points; he has just expanded somewhat on the facts and has made a number of the existing*

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> *points more clearly and more fully. Because of the concern expressed on behalf of Alan, I have limited my references so far to the judgment to the judgment in its original form, and not in its amplified form.* (emphasis added)

[37] I also refer to the speech of Lord Neuberger at the Annual Conference of the Supreme Court of New South Wales on 1 August 2014, where on the

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issue of *ex tempore* and reserved judgments had this to say:

> 23. Of course, one of the secrets of the *ex tempore* judgment, at least in England, is that the judge gets the opportunity to "approve" the transcript of the judgment before it goes to the parties. I use inverted commas because, while some judges just improve the punctuation and the syntax,

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> many judges use the opportunity to effect a fairly comprehensive rewriting. I have rewritten sentences even paragraphs. I have transposed paragraphs or even whole sections. I have even deleted sentences or paragraphs – sometimes because I simply could not understand what I had been trying to say. Once I added a paragraph because a brilliant new reason had occurred to me justifying my decision. In due course my

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> decision was overturned and the Court of Appeal said that the new point was a particularly bad one – showing that cheats do not prosper. If I was going to add a point, I should have made it clear that it was a piece of *esprit de I'escalier.*

[38] This view also appears in the article written by Justice Kirby of the

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Australian High Court entitled *Ex Tempore Judgments - Reasons on the Run*, where he stated on the issue of amendments to *ex tempore* judgments as follows:

> A few words of reassurance can close this section. First, it is always possible, and entirely proper, for a judicial officer to revise *ex tempore*

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> reasons, even extensively, without altering their substance or the orders which they sustain. It is not proper to revise the transcript of a summing up to a jury, except to the extent that an obvious typographical mistake has occurred or a mechanical mishearing of what was actually said. Then a marginal note can be transmitted to the appellate court setting out the alternative version. This may prompt the parties, if they do not agree, into

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> proving the correction of transcript in the formal way.

> On the other hand, where no jury is involved, the judicial officer may elaborate and correct the text when it is presented by the court reporter. This should always be done promptly as the delay in the presentation of revised reasons is a major source of delay in the conduct of appeals. It can become a cause for parties becoming out of time or filing deficient notices of appeal.

[39] Therefore, given the above, I am of the view that the grounds of my learned brother Justice Mohd Firuz bin Jaffril given *ex tempore* is not final and binding. This court must consider the written judgment dated 30 November 2018 that contains the actual grounds under which the said defamation suit was dismissed. His Lordships reasoning given *ex-tempore* is not final and is still subject to changes or amendments that may be made by court into a final written grounds delivered to parties.

[40] What the court cannot do is to change the orders made on the date the *ex-tempore* judgment is delivered. The orders once are sealed, the court will be *functus* and cannot make any other orders or amend the orders made. It could however change its views as to the reasoning as to why the said orders were made. The reasoning is crystallised when the written judgment is delivered by court.

[41] I am grateful for the defendant's counsel to bring to my attention the decision of the Court of Appeal in *Dr Chin Yoon Hiap v. Ng Eu Khoon & Ors And Other Appeals* [1998] 1 CLJ 533; [1998] 1 MLJ 57. Counsel for the defendant submits that this court should consider the earlier oral grounds as being the correct decision and that the subsequent written grounds at best supplementary to the oral decision delivered by my learned brother.

[42] However, the above-cited case relied on by the defendant's counsel is fact sensitive and does not apply to the facts at hand. In the aforementioned case, the learned trial judge had delivered two dated written judgments and one undated written judgment. The contents of these judgments contradict each other and were delivered nearly four months apart from one another.

[43] Abdul Malek Ahmad JCA (as he then was) held:

> If there are two judgments on the same point, he stressed, the second judgment must be disregarded. He had referred to *Syarikat Berkerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan Bhd v. Majlis Perbandaran Pulau Pinang* [1996] 3 CLJ 335 where this court, after an admirable analysis of several cases on the same point, ruled that supplementary grounds after a written judgment has been delivered may well affect judicial credibility because they could easily be mistaken for the wisdom of hindsight rather than representing the actual decision-making process. Consequently, it ruled that it is undesirable to have two written judgments in the same case. However, it added that this finding should not cause any injustice to the parties, since the appeal was by way of rehearing and the court must tackle afresh all the issues raised in the court below, including those the judge did not deal with.

A In his speech, my learned brother Mahadev Shankar JCA had distinguished between the words "judgment", "order", "decision" and "decree" and had said:

> In ordinary and even legal parlance, a 'judgment' is taken to mean both the intellectual process of arriving at a decision for the resolution of a dispute as well as the decision itself. Order 42 r. 5 of the Rules of the High Court 1980 states that if in the case of any judgment a form thereof is prescribed in Form 79, the judgment must be in that form. If by a judgment we mean the written statement containing the facts found, the inferences made and the law applied in coming to a verdict, then 'judgment' or 'order' clearly do not mean the same thing. The term 'grounds of decision' comes into play only when notice of appeal has been filed (see O. 49 r. 2(3) of the Subordinate Court Rules 1980, r. 18(4)(e) of the Rules of the Court of Appeal 1994 and r. 57(4)(e) of the Rules of the Federal Court 1995). These rules are not similarly worded so far as the High Court is concerned. It is clear that a 'written judgment' when juxtaposed with 'grounds of decision' does not mean the same thing as the 'judgment, decree or order appealed from' which has to be separately attached under r. 18(4)(e). We are unable to say from the record whether there was a separate application by the appellant for the grounds of decision, or whether these were gratuitously supplied by the judge when the notes of evidence were applied for. However, the reasons given by him for the dismissal of the application, and his decision to do so on 5 August 1994, are recorded in writing by him in his notes (24, 25) and signed.
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> *Albeit* with some regret, we must find that this was therefore a written judgment not merely in the sense of an 'order' but also in the sense of an order coupled with the grounds therefor.

In the course of the judgment in that case, the case of In the matter of the trusts of the will of Tan Lye deceased, *Yap Liang Neo v. Tan Yew Ghee & Anor* [1936] MLJ (Rep) 113 (hereinafter "*Yap*'s case") was cited where it was held that where two conflicting judgments had been given in the same matter, the second was held to be a nullity. It had also referred to *Hock Hua Bank Bhd v. Sahari bin Murid* [1980] 1 LNS 92 where the Federal Court ruled that a judge became *functus officio* after judgment is delivered or the order drawn up except under the slip rule.

The situation in the present appeal are quite different from that of *Syarikat Berkerjasama-sama*'s case. Here, the learned trial judge had dealt with the same issues differently in her two judgments and we were more inclined to hold, as in *Yap*'s case, that her second judgment is a nullity despite being conscious of the fact that since this is by way of rehearing, it was open to us to deal with all the issues afresh which we did but then our findings coincided with her first judgment.

We are also aware of two other authorities and although they both involved criminal procedure, the principle as regards the effect of two judgments would be the same. In *Habee Bur Rahman v. Public Prosecutor* [1970] 1 LNS 32, the trial judge held:

> Dealing for the moment only with judgments I should perhaps comment on the question of supplementing the grounds of decision.
>
> Section 221 of the Sarawak Criminal Procedure Code (Cap. 58) provides as follows:
>
> No court, other than the High Court having once recorded its judgment, shall alter or review the same.
>
> It is not permissible for a trial court having signed and delivered its grounds of decision to supplement the grounds of decision or to amplify them in any way.
>
> It is however not such conduct as can be said to have occasioned a miscarriage of justice or such as can be said to warrant or require or even justify the trial being regarded a nullity and the conviction being quashed.
>
> The only effect of it was that the appellate court must consider the original judgment as it stood and exclude any consideration of the parts added. (See *Loh Kwang Seang v. Public Prosecutor* [1960] 1 LNS 64 and *Ankur Nath Ganguli v. Public Prosecutor* [1956] 1 LNS 9.)

I therefore exclude from my consideration the second judgment of the learned magistrate.

In *Ankur Nath Ganguli v. Public Prosecutor* [1956] 1 LNS 9 the Court of Appeal held:

> If a trial judge gives no reasons which are recorded for convicting an accused person, then and only then by sub-s. (1) of s. 21 of the Courts Ordinance 1948, he can on notice of appeal being given write his grounds of decision which shall form part of the record. That subsection permits only a written judgment or grounds of decision being included in the record, and this must be either the one or the other, not both. Any addition to the oral judgment cannot form part of the record of appeal.

Based on these considerations, we came to the conclusion that only the first judgment can be considered especially since we have no inkling as to why there were two separate judgments eight months apart and because the contents of the second judgment are not exactly an elaboration of the first judgment resulting in the fact that they actually do not tally in substance. This is compounded by the fact that in between the two judgments, there is another written decision (hereinafter "the decision") which is undated, except for the certification by the judge's secretary on 28 March, where the year is not stated but it must be 1995, that the copy is correct, ... (emphasis added)

A Therefore, the decision of the Court of Appeal concerns written grounds that are contradictory to one another. The case does not concern with an *ex tempore* judgment delivered orally by a judge and that was subsequently put down into writing.

B **[44]** Given the above, I do not believe that the *ex tempore* reasoning of my learned brother as contained in the notes of proceedings is conclusive and final. The orders made on the said date will be final and binding, but this should not extend to the reasoning coming to the said decision.

C **[45]** The alleged finding that the defendant in those proceedings was entitled to the defence of fair comment did not appear in the final reasoning. This would have meant that my learned brother found it appropriate that this reasoning is not the reason why the suit was dismissed but is caused by the failure to plead the words in Tamil in the original language in the statement of claim and the failure to call an interpreter at trial.

D **[46]** I also do not find the written grounds by my learned brother to be a nullity. They do not contradict the earlier oral grounds delivered by him but merely crystallise the issues that led to his decision dismissing the claim against the defendant in those proceedings. The written grounds contain an exact elaboration of the reasoning contained in the oral reasoning.

E **[47]** Accordingly, I find that the plaintiff has successfully shown to me that it was the defendant's failure that had caused damage to the plaintiff, and he is, therefore negligent in the conduct of the case on behalf of his client. It was the defendant's negligent conduct of the suit that was "the effective cause of the harm suffered by the plaintiff." I, therefore, reject the defendant's F argument that the earlier suit was also dismissed on the grounds of fair comment as that was contained in the written grounds of my learned brother Justice Mohd Firuz bin Jaffril.

Whether The Defendant Had Advised The Plaintiff Of A Need Of A Translator

G **[48]** The second argument put forward by the defendant to deny liability for negligence is his reliance on the letter dated 13 November 2017 issued in the name of Messrs. Mugu & Sufyan & Co stating that the plaintiff had informed the defendant that (i) the translator was not willing to attend the trial to give evidence on the said translation and (ii) that the defendant does not wish to subpoena the said translator and that (iii) the defendant will not H be responsible for the failure to call a translator to court to give evidence as to the words that were allegedly defamatory in Tamil.

[49] The defendant also relies on the evidence of his secretary, DW2, who confirms that the letter was drafted by her on the instruction of the defendant but also confirms that the said letter was only given to an alleged staff of the I plaintiff and not to the plaintiff personally. A copy of the said letter was returned by the said person, who is unknown and unnamed, to the

defendant's office. The plaintiff denies receiving the said letter and denies that his signature appears on the said document. There is no evidence produced by the defendant to confirm that the said signature appearing in the letter dated 13 November 2017 was that of the plaintiff.

[50] I reproduce the relevant parts of the evidence of DW2:

> PB: Ok. My next question to you, did you enquire with your client at that time Mr Muthiah that you need to appoint a certified translator before you could proceed drafting the statement of claim?
>
> MUGU: Well, my advice to him was when he first came and gave me the newspaper articles in the, from the newspapers, I said let's go and get an interpreter from the court itself because firstly I need to understand what the articles are about, I need to understand whether the statements are defamatory in the first place. So, I said let's go and get someone from the courts. And because my office is very much next to, very near the courts, it's just a couple of minutes away by car. So I said let's go and get that, what you call, interpreter by the name of Steven who works in the Magistrate's Courts or one or two other interpreters I generally use for translations. I generally use them not for, so much for defamation matters but for other matters involved for the Indian High Commission and what not. So, one of them was a lady called, Vali (2/00/12) and I am probably used one or two others. So, I said, look, it is much more convenient to go and get someone from the Courts who is a translator there and in the event the translation is challenged or what not, they can always just come and give evidence quite easily, because they are already in Court. So I advised him to go and get a Court translator or allow me to send it to the Courts for translation in which case we will pay translation cost.

[51] The defendant suggests that he had personally advised the plaintiff of the need to obtain an interpreter. He also allegedly had issued a letter to the plaintiff based on the testimony of DW2. I do not find that the evidence of the defendant on this issue is credible.

[52] I do not believe that the defendant had personally informed the plaintiff of the need to obtain the services of an interpreter. It is strange for the defendant to suggest that he had undertaken the translation of the impugned words through an individual by the name of "Steven" when he drafted the statement of claim and at the same time did not produce such a person to support the plaintiff's case at trial. If he had in fact procured the services of the said "Steven" to translate the article at the time of drafting, then surely any fees payable to procure the services of the said "Steven" would have been inconsequential as the said person had already undertaken the works earlier. This alleged person was also not called by the defendant to support his assertion that a translation of the said work had been undertaken at the early stage as suggested by DW1.

[53] I note that the defendant contends that this decision is attributable to the plaintiff's decision not to incur further costs and was reluctant to pay the interpreter's fees. However, I find that the said explanation not to be reliable since the plaintiff did pay the defendant in full the sum of RM50,000 as fees for bringing the claim and for the sum of RM3,000 as disbursements to be incurred for the said suit.

[54] I find it unlikely that the plaintiff would have put his case at risk simply because of fees to be incurred for the services of an interpreter. I do not accept the said explanation by the defendant as being probable and reject the same.

[55] As to the letter and the alleged written advice contained therein, I do not find that the evidence of DW2 shows that the said letter was received by the plaintiff. The letter was issued to a third person who is not identified and is unclear as to whether he was an agent or employee of the plaintiff. The defendant should have ensured that the said advice is received by the plaintiff and not by a third party.

[56] In the circumstances, I find that on the balance of probabilities that the defendant has failed to prove that the plaintiff was adequately advised as suggested by the defendant.

Whether The Plaintiff's Defamation Claim Was So Weak That It Was Bound To Fail And That The Plaintiff's Evidence At The Defamation Trial Was Also Weak

[57] I also note that the defendant also argued that even if it was negligent in undertaking the suit appropriately on behalf of the plaintiff, the suit was so weak at the outset it was bound to fail.

[58] I find that this argument does not hold water. I refer again to the decision of Vazeer Alam Mydin Meera JC in the above-referred case. It is worth repeating what His Lordship stated in that case which is reproduced herein:

> In fact in the case of *Sykt Siaw Teck Hwa Realty & Developments Sdn Bhd v. Malek & Joseph Au* 199913 CLJ 184; [1999] 5 MLJ 588 the court held that it was indeed mischievous and unethical of the solicitor to justify his breach of duty of care by raising the question of the merit of the client's appeal and its lack of prospect of success in order to defeat the client's claim for damages in an action for negligence. *In Allen v. Sir Alfred McAlpine & Sons Ltd and other appeals [1968] 1 All ER 543 Lord Denning MR speaking for the English Court of Appeal held that when an action is dismissed as a result of a solicitor's negligence, the client:*
>
> > *... in a subsequent action for negligence against his solicitor can recover, in addition to the costs of the action which has been dismissed, compensation for the loss of his chances of recovering damages against the defendant in the dismissed action had been properly conducted on his behalf by the solicitor.*

[19] Further, in *Sharif and others v. Garret & Co (a firm)* [2001] 3 All ER 195, the respondent firm of solicitors were sued in negligence when its client's case was struck out for want of prosecution. The Court of Appeal of England and Wales, laid down a two-tier approach to the assessment of damages. Simon Brown LJ speaking for the Court of Appeal held as follows:

> In stating the principles generally applicable to this class of case, I indicated in *Mount v. Barker Austin (a firm)* [1998] PNLR 493 at 510, 511 a two-stage approach. First, the court has to decide whether the claimant has lost something of value or whether on the contrary his prospects of success in the original action were negligible. Secondly, assuming the claimant surmounts this initial handle, the court must then 'make a realistic assessment of what would have been the plaintiff's prospects of success had the original litigation been fought out'.
>
> *With regard to the first stage, the evidential burden rests on the negligent solicitors: they, after all, in the great majority of these cases will have been charging the claimant for their services and failing to advise him that in reality his claim was worthless so that he would be better off simply discontinuing it. The claimant, therefore, should be given the benefit of any doubts as to whether or not his original claim was doomed to inevitable failure.* With regard to the second stage, the *Armory v. Delamirie* (1722) 1 Stra 505, [1558-1774] All ER Rep 121 principle comes into play in the sense that the court will tend to assess the claimant's prospects generously given that it was the defendant's negligence which has lost him the chance of succeeding in full or fuller measure.

[20] I find that the approach taken by the Court of Appeal of England and *Wales in Sharif and others v. Garret & Co (a firm)* (*supra*) in assessing damages in a claim for solicitor's professional negligence is both practical and useful. In fact the initial determination of the question of whether the claimant has lost something of value as a result of his solicitor's breach of duty has been applied by our Court of Appeal in *Lim Soh Wah & Anor v. Wong Sin Chong & Anor (and Another Appeal)* [2001] 2 CLJ 344; [2001] 2 AMR 2001. (emphasis added)

[59] I also refer to the decision of the Court of Appeal in *Nyo Nyo Aye v. Kevin Sathiaseelan Ramakrishnan & Anor And Another Appeal* [2020] 5 CLJ 82 where Suraya Othman JCA held:

> [54] Further, on this point, the plaintiff's counsel submitted to us that the defendants who represented the plaintiff in the first suit should not have taken up the case against the executor if they had felt that there is no prospect of success of winning the case. We are in agreement with this argument. A lawyer should not have taken up a weak and hopeless case to court knowing that there is no prospect of success. This is unethical. A lawyer should only bring a case to court if they feel that they have a fairly good chance of winning. If the case is weak and hopeless, with no

A prospect of winning, it is incumbent upon the lawyer to advise the client, and to only proceed to file a case in court, despite the advice given, upon instruction of the client. Preferably, in such a situation, the advice by the lawyer should be in writing and the instruction to proceed by the client too, despite the advice given that the case is weak and hopeless, should also be in writing. Otherwise, as in this instant case, whereupon being
B sued for professional negligence, it is absurd to turn the table against the client by arguing that the case was weak and hopeless with no chance of winning. In such circumstances, the question that begged to be answered is, did the lawyer in the first place advice the client on the prospect of the case, and if he did, was the advice ignored. Otherwise, without any evidence that such an advice was proffered, the reasonable inference
C would be that, the lawyer in putting up such a defence is trying to save himself from a professional negligent suit which was of his own making in the first place.

[60] Therefore, it lies badly for the defendant to now allege that the plaintiff had a bad case to begin with. If that was the position, then he should
D have informed the plaintiff and advised him not to pursue with the suit in the first place.

[61] I also do not find any credible evidence to suggest that the claim for defamation instituted by the plaintiff through the defendant was bound to fail
E or is a bad case. There is no written advice given by the defendant to the plaintiff to warn him of the weaknesses in the case and that he should not pursue with the suit. This issue only came to the fore when the suit for negligence was instituted against the defendant.

[62] I also reject the defendant's contention that the evidence given by the
F plaintiff at the defamation trial was so weak that the suit was bound to fail. As I have indicated earlier, it was the failure by the defendant to plead appropriately as required under the rules and his failure to call a qualified interpreter that had caused the dismissal of the suit. This is reflected in the written grounds of Justice Mohd Firuz.

G **[63]** Secondly, the defendant himself did not warn the plaintiff of such risk and that the case had gone badly based on the evidence given by the plaintiff at trial. If this was the case, he should have then put this on record and informed the plaintiff that perhaps the best foot forward at that juncture is to withdraw the suit and bear the brunt of costs. He should have been candid
H with his client. This indicates to me that the allegation is merely an afterthought to deny liability after a suit for negligence was filed by the plaintiff.

[64] Given the above, I reject the aforesaid defence and do not find that this negates the claim by the plaintiff against the defendant.

I

That The Defendant Had Continued To Act As Solicitors For The Plaintiff And His Son

That This Suit Was Commenced Due To An Ulterior Motive To Stop The Defendant From Pursuing His Fees Against The Son And From Assisting With The Police Investigation On The Affairs Of The Plaintiff

[65] I am of the opinion the contention by the defendant that he could not have been negligent as he had continued to act for the plaintiff or his son after the suit was struck out, is without legal basis.

[66] I find that the fact that the defendant may have continued to act for the plaintiff and his son does not automatically mean that he was aware of the alleged advice given by the defendant that (i) he had a weak case in the first place and (ii) that the failure to call the interpreter was due to the plaintiff's own decision. As I have said earlier, the defendant has failed to prove that he had given such advice to the plaintiff and that there is no credible evidence that the above-referred letter and the alleged advice were given to the plaintiff.

[67] On the issue of the ulterior motive, I find that this is at best mere conjecture or afterthought on the part of the defendant. The plaintiff's previous solicitors may have spoken to the defendant as alleged but that does not mean that the intention of this suit is to put pressure on the defendant not to sue the plaintiff's son for fees and not to cooperate with the alleged police investigation.

[68] I also find that this contention is contrary to the events that transpired subsequently. The suit for fees against the plaintiff's son for fees by the defendant was eventually dismissed. From the evidence it was shown that the fees were owed by the society and not from the plaintiff's son. Therefore, it cannot be said that there was such pressure put upon the plaintiff to cause him to initiate this suit against the defendant. After all, it would have been clear from the outset who bears responsibility for the fees incurred for an action instituted by office bearers of a registered society on behalf of the society.

[69] Secondly, the contention that the plaintiff instituted this claim to stop the plaintiff from assisting in a police investigation is also unsupported by evidence. I do not find any evidence before of any police investigation on the affairs of the plaintiff. Furthermore, as an advocate and solicitor formerly retained by the plaintiff, he cannot divulge any advice, or any information provided by his client to any third party unless it was undertaken for the pursuit of a criminal investigation. That is trite and I do not find such contention credible based on the evidence before me.

[70] Therefore, I reject both contention/defences raised by the defendant.

A **Liability Of The Defendant**

[71] I note that the plaintiff did not produce evidence of an advocate and solicitor to show the standard to be expected of a reasonably competent advocate handling a similar defamation suit. However, I find that this is not necessary as the failure by the defendant is concerning an area of law that is
B so trite that it is expected of any competent litigator before our courts.

[72] I refer again to the decision of the Court of Appeal in *Nyo Nyo Aye v. Kevin Sathiaseelan Ramakrishnan & Anor And Another Appeal* [2020] 5 CLJ 82, where on the issue of the necessity to call such experts to show the standard of care required of a reasonably competent advocate, the court opined:
C

> [64] On the need to call expert evidence, we are of the view that in our instant case the fact that no expert was called to give evidence on the standard of care, is not fatal. The case of *Shearn Delamore* and *Tetuan Theselim Mohd Sahal* have to be distinguished. *Tetuan Shearn Delamore* (*supra*) it is a case on intellectual property and the case of *Tetuan Theselim*
> D *Mohd Sahal* (*supra*) involves an SPA. Both these cases on intellectual property and conveyancing require an expert to be called to establish the standard of care required or expected from competent practitioners practicing in those specialised fields to establish whether the standard of care has been breached. In our instant case, it is a simple case. It pertains
> E to the duty of a practitioner to inform and advise the client of the consequence of non-payment of SFC which would result in the case being struck off. It involves the duty of the practitioner to be diligent, to ask for an extension of time if time has expired and foremost to inform the client on the prospect of success of the client's case and not lead the client on and when the case got struck off to turn the table against the client by
> F alleging that the case has no prospect or chances of winning after all. We found the learned JC had extensively delved into the facts of the case before His Lordship made his findings that the defendants are negligent and in breach of their retainer. The learned JC also found the defendants' version improbable as against the plaintiff's version which is probable since the defendants, as professionals, have not kept any records of
> G correspondences of their communication with the plaintiff on matters of great importance. In such circumstances, we are of the considered view that the learned JC's findings are correct and therefore do not warrant our appellate intervention.

[73] Based on the aforesaid, I find that the plaintiff had acted negligently
H by failing to plead in a claim for libel the statements in the original language complained of by the plaintiff and for failure to call an interpreter to explain the words from its original language. To be clear I make the following finding:

(i) A reasonably competent solicitor undertaking a similar claim for libel
I or slander would have pleaded the original words in Tamil in the statement of claim with the required translation in Malay or English and would have called an interpreter to prove the said words at trial.

(ii) The defendant had failed to exercise the standard of care practised to be expected by a reasonably competent solicitor by failing to plead the original words in Tamil in the statement of claim with the required translation in Malay or English and would have called an interpreter to prove the said words at trial.

(iii) The defendant had failed to act with diligence in exercising the reasonable care and skill expected of a reasonably competent solicitor undertaking a claim for libel or slander on behalf of his or her client.

(iv) The defendant had failed to advice the plaintiff appropriately of the need to call a translator at trial.

[74] I find that the defendant should have taken care when he pleaded the statement of claim and should have considered the strict requirements expected in a claim for defamation especially when the original impugned words are not in Bahasa Malaysia or English. I take heed of the warning by S Nantha Balan JCA in *Hijau Biru Envirotech Sdn Bhd v. Tetuan Dzahara & Associates & Ors* [2021] 1 CLJ 186:

> It is therefore obvious enough that a reasonably competent advocate and solicitor who represents a client in court proceedings must not only be up-to-date with the law (both procedural and substantive), but must also perform the most basic, fundamental or rudimentary duty of attending court on the hearing or mention or case management date, as the case may be. (see *Lembaga Kemajuan Tanah Persekutuan (FELDA) & Anor v. Awang Soh Mamat & Ors* [2009] 5 CLJ 1; [2009] 4 MLJ 610; [2010] AMR 285 CA and the instructive decision of the Federal Court in respect of the same case reported as [2010] 3 CLJ 895; [2010] MLJU 34 FC).

[75] I will now consider the two-stage test whether the plaintiff had suffered any damage because of the defendant's negligence.

[76] As I have stated earlier, the defendant has failed to show that the defamation case was bound to fail. The burden of proof lies on the defendant, as he did charge the plaintiff fees for his services to act as solicitor and counsel for the plaintiff. As I have said earlier, there is no written advice, or any written instrument sent to the plaintiff warning him that the case was weak and that he should not pursue it or that the evidence was so weak that the plaintiff should withdraw the claim.

[77] Given the above, I find that the plaintiff did lose something of value caused by the failure of the defendant to ensure that the pleadings were undertaken in accordance with the requirements of the Rules of Court and failed to ensure that an interpreter was called to give evidence as to the meaning of the words during the trial.

[78] I note that for the purpose of the second part of this test, I must then "make a realistic assessment of what would have been the plaintiff's prospects of success had the original litigation been fought out". At first blush, one would think that this is an easy test to be fulfilled by the plaintiff as it has been shown that the litigation was undertaken negligently. My reading of the law on this area however shows otherwise.

[79] I refer to the decision of the English Court of Appeal in *Kitchen v. Royal Air Force Association* [1958] 1 WLR 563. This case concerns the electrocution and the unfortunate death of the plaintiff's late husband. The solicitor appointed failed to institute proceedings within the limitation period. The plaintiff then sued the said solicitors in negligence. The High Court hearing the case agreed that the solicitors were negligent but reduced the amount claimed based on the difficulties faced in the original action and that there was still a risk that the suit would be found in favour of the defendant.

[80] The English Court of Appeal confirmed the decision of the High Court and held as follows:

> If, in this kind of action, it is plain that the action could have been brought and [that] if it had been brought that it must have succeeded, of course the answer is easy. The damaged claimant would recover the full amount of the damages lost by the failure to bring the action originally. On the other hand, if it be made clear that the claimant never had a cause of action, that there was no case which the claimant could reasonably ever have formulated, then it is equally plain that the answer is that she can get nothing but nominal damages for the solicitor's negligence ...
>
> The present case, however, falls into neither one nor the other of the categories which I have mentioned. There may be cases where it would be quite impossible to try "the action within the action" ... In my judgment, assuming the that the claimant has established negligence, what the court has to do in such a case as the present is to determine what the claimant has lost by that negligence. The question is: Has the claimant lost some right of value, some chose in action of reality and substance? In such a case it may be that its value is not easy to determine, but it is the duty of the court to determine that value as best it can.

[81] I also refer to the decision of the English Court of Appeal in *Mount v. Barker Austin* [1998] PNLR 493/[1998] EWCA Civ 277. In that case the judges of the English Court of Appeal stated:

> (i) Moore-Bick J (siting as a Judge of the Court of Appeal)
>
> When a person sues his former solicitors for negligence in the conduct of proceedings which has led to his action being struck out his loss is normally measured by reference to his prospects of success in the primary litigation: see *Kitchen v. R.A.F. Association* [1958] 1 WLR 563. However, in order to recover for the loss of that kind the court must be satisfied that the plaintiff had at least a

"real" or "substantial" chance that he would have succeeded in the primary action, not merely a speculative one: see *Allied Maples Group v. Simmons & Simmons* [1995] 1 WLR 1602 per Stuart-Smith LJ at 1614. If his prospects of success fall short of that, the court will ascribe no value to them, but provided the court can see that there were real prospects of success it will evaluate them notwithstanding the difficulties that may involve. The need to evaluate the prospects of success in that way usually arises because of uncertainty as to the final shape of the evidence which would have been before the court trying the primary action. In some cases, however, the outcome of the primary action is not in doubt, for example, if it can be seen that the claim is bad in law and could never have succeeded. In such a case, of course, there never were any prospects of success at all.

(ii) Simon Browne LJ

With these considerations in mind I would state the applicable principles as follows:

1. The legal burden lies on the plaintiff to prove that in losing the opportunity to pursue his claim (or defence to counter-claim) he has lost something of value *ie*, that his claim (or defence) had a real and substantial rather than merely a negligible prospect of success. (I say 'negligible' rather than 'speculative' – the word used in a somewhat different context in *Allied Maples Group Limited v. Simmons & Simmons* [1995] 1 WLR 1602 – lest 'speculative' may be thought to include considerations of uncertainty of outcome, considerations which in my judgment ought not to weigh against the plaintiff in the present context, that of struck-out litigation.)

2. The evidential burden lies on the defendants to show that despite their having acted for the plaintiff in the litigation and charged for their services, that litigation was of no value to their client, so that he lost nothing by their negligence in causing it to be struck out. Plainly the burden is heavier in a case where the solicitors have failed to advise their client of the hopelessness of his position and heavier still where, as here, two firms of solicitors successively have failed to do so. If, of course, the solicitors have advised their client with regard to the merits of his claim (or defence) such advice is likely to be highly relevant.

3. If and insofar as the court may now have greater difficulty in discerning the strength of the plaintiff's original claim (or defence) than it would have had at the time of the original action, such difficulty should not count against him, but rather against his negligent solicitors. It is quite likely that the delay will have caused such difficulty and quite possible, indeed, that that is why the original action was struck out in the first place. That, however, is not inevitable: it will not be the case in

A particular (a) where the original claim (or defence) turned on questions of law or the interpretation of documents, or (b) where the only possible prejudice from the delay can have been to the other side's case.

4. If and when the court decides that the plaintiff's chances in the B original action were more than merely negligible it will then have to evaluate them. That requires the court to make a realistic assessment of what would have been the plaintiff's prospects of success had the original litigation been fought out. Generally speaking one would expect the court to tend towards a generous assessment given that it was the defendants' C negligence which lost the plaintiff the opportunity of succeeding in full or fuller measure. To my mind it is rather at this stage than the earlier stage that the principle established in *Armory v. Delamirie* (1722) 1 Stra. 505 comes into play.

[82] I believe that I must now determine or put a value to the plaintiff's D loss of chance. I am not tasked to determine what would have been decided or the outcome of the said suit *ie*, the hypothetical decision in the lost trial if the defendant was not negligent. It is the value of the prospects of pursuing the claim had the pleadings been properly pleaded and that he had called the interpreter to prove the words that were allegedly defamatory.

E **[83]** I find that the plaintiff has however failed to prove the value of what he had lost because of the defendant's negligence. What has been produced before me at trial were merely the pleadings and the notes of evidence of the proceedings before the Justice Mohd Firuz. The plaintiff did not explain to this court the extent of the alleged defamation, did not produce the impugned F article, and did not explain or provide evidence of the alleged defamation that was made against him. He could not show the amount of what would have been awarded if the suit was properly pleaded by the defendant.

[84] The plaintiff's evidence only stopped short of the fact that he had appointed the defendant and that the defendant had been negligent in his G duties as a solicitor.

Q: Lets look at paragraph 5, the last paragraph where you say my client be paying you. Beliau mengetahui punca meninggalkan jawatannya dan tindakannya untuk kembali ke pangkuan persatuan disyaki. You understand that?

H A: Only that part.

Q: So, now the words beliau mengetahui punca meninggalkan jawatannya dan tindakannya untuk kembali ke pangkuan persatuan. My client is in a fact we are saying that only you know the reason why you have left your formal position as President Persatuan. So, I that comes up in the 2nd last paragraph, the last line. That's true isn't it you resigned your

A: Yes.

Q: So, that is entirely true isn't it? A

A: Yes.

Q: So, nothing wrong with my client saying that only you know the reason why you left, nothing wrong with that?

A: Yes that is true.

Q: Where is the word disyaki? Pointed out in that line. B

A: There is no words here saying disyaki but he says it is mysterious.

Q: So, it is mysterious, it is not suspicious, not disyaki agree?

A: Yes.

Q: Which means that when you have agreed the first part of the sentence is true. The 2nd part of the sentence you are saying that words suspicious is not there, it just mysterious. So, it is not exactly defamatory to you isn't it? You just says that it mysterious why you want to come back as President correct? This is the only defamatory statement? C D

A: I am not talking about this, there is another one in front.

Q: My learned friend in his pleadings Mr. Muthiah also displeaded this line and another line in the following page. So, only this 2 lines were so called defamatory. So, on this there is nothing defamatory isn't it? You are talking about this note something else? E

A: I am not talking about that, there is another article. Yes, in this Tamil article as it says its mysterious it is consider as defamatory.

Q. Mysterious you consider as defamatory?

A: What he saying is when he says it mysterious his suspicious about me, that's why he said mysterious. The article says it mysterious. F

Q: Isn't it there was a question, mysterious why you want to come back as President, you agree?

A: That is

Q: I put it to you that there is nothing that sentence which is defamatory towards? G

A: I disagree, it is defamatory

Q: The following page, this the other line which you say that it is defamatory towards you. The lines would says para 3, beliau juga mempersoalkan tindakan *Encik v. Muthiah* yang menyebarkan fitnah ketika berada di luar Negara. I only interested in the word fitnah. Could you refer to the same article. Fitnah means defamatory. Could you refer to the same articles. I forgot to marked down the words in the article. What is the actual tamil words for fitnah in this article? So, fitnah alone what is the word? I am instructed that this word...doesn't mean fitnah or defamation. It means in accurate or wrong statement, agree? H I

A: It also can be said in the context as say wrong things.

Q: So it is wrong things not defamatory things? Not fitnah isn't it?

A: That's why I am concern it means fitnah

Q: Avadue doesn't means fitnah. It means wrong or inaccurate, tidak tepat?

A But this word also if we allaborated the maning of saying wrong things.

Q: I put it to you that the regards to this statement, there is also nothing defamatory because this word avadue doesn't means fitnah. Fitnah ketika berada di luar menyebabkan fitnah. It means wrong things as stated above or it means in accurate statement, you agree?

A: I disagree.

Q: Next page. Oleh itu, mereka yang tidak mempunyai jawatan tinggal dalam persatuan perlu memberhentikan kenyataan palsu. First thing, are you referred by name in the sentences?

A: There is no name in this sentence.

Q: There is no name because it's a general statement isn't it? Mereka yang tidak mempunyai jawatan tinggi dalam persatuan perlu memberhentikan memberi kenyataan palsu. So, the very general statement those who do not have l-position in the persatuan have to stop making false statement, it's a general statement doesn't refer to you, do you agree?

A: Yes I agree.

Q: So, because he doesn't referred to you it is not a defamatory, it's a general statement?

A: I only referring to the 1st article that was published.

Mah: We are not talking about the 1st article. You are sawing o 4th article.

A: Its to derive from the 1st article.

Mah: So, bila refer 4th article, only 4th article. You asked for 2 million right? Because there are 5 articles. So, kalau one article tidak nampaklah kuat sangat 2 million right?

Q: I am putting it to you that it was the true statement because it is just a general statement? It's a fair comment because it is just a general statement. That those who do not have high position in the Persatuan has stopped making kenyataan palsu, agree?

A: Yes I agree.

[85] I also note that the plaintiff did not file any reply to the defences filed by the defendant in the aforesaid defamation claim. The defendant in those proceedings has raised the defence of fair comment and qualified privilege

and these would have been a complete defence to the claims filed by the plaintiff. The plaintiff on the other hand did not plead malice on the part of the defendant in those proceedings to answer the said defences.

[86] As I said earlier, there was no evidence or explanation as to the value of the suit especially the alleged defamation and the potential defences put forward by the defendant in those proceedings. This should have been undertaken and explained by the plaintiff in support of his claim for damages. The burden of proving the value of the loss of chance and the potential success of his claim lies on him. At the very least, the plaintiff should have explained the contents of the article that he says was defamatory to this court. This was not done.

[87] Hence, I find that the plaintiff is only entitled to nominal damages because of the negligence of the defendant. He has not proven that he would have won even if the matter had been properly conducted and not shown to this court the value of the loss of opportunity. He had loss his chance, caused by the negligence of the defendant. That however does not mean that he has shown the amount that would have been awarded by the court in the earlier proceedings, if not for the said act of negligence.

[88] On the issue of the claim for the return of the fees of RM50,000 and for the return of the disbursements paid, I am of the view that the evidence before me, especially the notes of proceedings, indicates that the defendant had undertaken substantial work for the plaintiff *albeit* negligently. I am therefore unable to grant the plaintiff a return of the said fees and disbursements paid.

The Defence Of *Novus Actus Interveniens*

[89] The final issue raised by the defendant concerns the issue of the failure by the plaintiff to file an appeal to the Court of Appeal. This was admitted to by the plaintiff under cross-examination.

[90] However, this does not detract from the fact that the defendant had failed to undertake proper conduct of the suit for the plaintiff. The failure to appeal would not have changed the act of negligence complained by the plaintiff.

[91] I also find that the reliance by the defendant on the decision of the court in *Malaysian Motor Insurance Pool (administered by MMIP Services Sdn Bhd v. Murali Sandrakasan & Anor* [2021] 11 MLJ 776 is misplaced. The said case concerns with the decision of the plaintiff to negotiate a settlement of the claim that had caused the loss of RM4 million and one could no longer attribute the said loss to the actions of the earlier solicitors. Therefore, I do not believe that the reasoning of the court in the earlier case could be utilised as suggested by the defendant in this proceeding. I disagree that the failure to appeal could be seen as an intervening event that discharge the defendant from any form of liability.

A **Orders Of This Court**

[92] For the above reasons, I make the following orders:

(i) Declaration that the defendant had been negligent in undertaking the civil suit on behalf of the plaintiff.

B (ii) The defendant is directed to pay the plaintiff nominal damages to the sum of RM20,000.

(iii) Interest on the aforesaid sum at 5% per annum from the date of the order until the date of full realisation.

C (iv) Costs to be paid by the defendant to the plaintiff for the sum of RM25,000 subject to allocator.

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